Jerry WA Dusing @ Jerry W Patel & Anor v Majlis Agama Islam Wilayah Persekutuan (MAIWP) & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)-93–04 OF 2016
HAMID SULTAN, ZAMANI A RAHIM AND ZALEHA YUSOF JJCA
30 SEPTEMBER 2016

Civil Procedure — Intervention — Application for — Right to intervene — Judicial review — Constitutional rights to use word 'Allah' in religious publication — Appeal against decision of High Court in allowing proposed intervener to intervene in judicial review application — Whether proposed intervener possessed implied power — Whether proposed intervener demonstrated direct interest — Whether corporate body such as proposed intervener has right to intervene

The appellants appealed against the decision of the learned High Court judge who allowed the first respondent, Majlis Agama Islam Wilayah Persekutuan ('MAIWP') to intervene and made as one of the respondent to the judicial review application. The several declarations that the appellant sought related to the applicants constitutional right to use the word 'Allah' in the Bahasa Malaysia and/or Bahasa Indonesia translations of the Bible as well as in all religious publications and materials in Malaysia. The real issue before the trial court was whether a corporate body such as MAIWP has a right to intervene. The High Court judge held that MAIWP had no express power to intervene but went on to rule that MAIWP had implied power without citing any authority for such a proposition in Malaysia or in the Commonwealth.

Held, allowing the appeal with no order as to costs; setting aside the order of High Court:

(1) To determine the question whether MAIWP has the right to intervene, the only issue was whether MAIWP had demonstrated a direct interest in the instant case as well as whether the attorney general will be the most appropriate person to speak on behalf of public interest issues as guardian of public interest. In the instant case, the senior federal counsel was acting for the second and third respondents. Therefore, the attorney general was already indirectly participating in the said action. It must also be pointed out that the appellant had no objection for the MAIWP to appear as amicus curiae (see paras 18–19).

(2) Where a party does not have a right to intervene but the court takes the view that the importance of the questions involved in the proceedings;

the intervention as amicus curiae is permissible. The threshold test for intervener is for the applicant to demonstrate direct interest. It could not be seen how MAIWP will be affected by any order of the court other than a circuitous reasoning which will not satisfy the direct interest test. MAIWP had no rights over and owed no liabilities to the appellant or non-Muslims. However, MAIWP has a positive role to play within the mandate of MAIWP Act 1993 to assist the court as amicus curiae. In consequence, the order for intervention was set aside with liberty for MAIWP to appear as amicus curiae in the High Court. As a consequential order, the appellant was to make the necessary amendments to the parties to the suit (see paras 23 & 27).

[Bahasa Malaysia summary

Perayu-perayu merayu terhadap keputusan hakim Mahkamah Tinggi yang membenarkan responden pertama, Majlis Agama Islam Wilayah Persekutuan ('MAIWP') untuk mencelah dan membuatnya sebagai salah seorang responden kepada permohonan semakan kehakiman. Beberapa perisytiharan yang perayu pohon adalah berkaitan hak perlembagaan pemohon-pemohon untuk mengunakan perkataan 'Allah' dalam terjemahan dalam Bahasa Malaysia dan/atau Bahasa Indonesia terhadap kitab Injil dan juga dalam kesemua penerbitan keagamaan dan material di Malaysia. Isu sebenar di hadapan mahkamah perbicaraan adalah sama ada badan korporat seperti MAIWP mempunyai hak untuk mencelah. Hakim Mahkamah Tinggi memutuskan bahawa MAIWP tidak mempunyai kuasa nyata untuk mencelah tetapi terus memutuskan bahawa MAIWP mempunyai kuasa tersirat tanpa menyatakan apa-apa autoriti untuk cadangan sedemikian di Malaysia atau Commonwealth.

Diputuskan, membenarkan rayuan tanpa perintah kepada kos; mengetepikan perintah Mahkamah Tinggi:

(1) Untuk menentukan soalan sama ada MAIWP mempunyai hak untuk mencelah, satu-satunya isu adalah sama ada MAIWP telah menunjukkan kepentingan langsung dalam kes ini dan juga sama ada Peguam Negara adalah orang yang paling wajar untuk bercakap bagi pihak isu kepentingan awam sebagai penjaga kepentingan awam. Dalam kes ini, peguam kanan persekutuan bertindak bagi responden kedua dan ketiga. Oleh itu, Peguam Negara telah secara tidak langsung menyertai dalam tindakan tersebut. Ia mesti juga ditunjukkan bahawa perayu tidak membantah untuk MAIWP hadir sebagai amicus curiae (lihat perenggan 18–19).

(2) Di mana pihak tidak mempunyai hak untuk mencelah tetapi mahkamah mengambil kira bahawa pentingnya soalan-soalan yang terlibat dalam prosiding; campur tangan sebagai amicus curiae adalah dibenarkan. Ujian ambang untuk pencelah adalah untuk pemohon menunjukkan

kepentingan langsung. Ia tidak dapat dilihat bagaimana MAIWP akan terjejas oleh apa-apa perintah mahkamah selain daripada alasan berbelit-belit yang mana tidak akan memuaskan ujian kepentingan langsung. MAIWP tidak mempunyai hak ke atas dan tidak menanggung liabiliti kepada perayu atau orang bukan Islam. Walau bagaimanapun, MAIWP mempunyai peranan positif untuk bertindak dalam mandat Akta AIWP 1993 bagi membantu mahkamah sebagai amicus curiae. Akibatnya, perintah untuk campur tangan diketepikan dengan kebebasan bagi MAIWP untuk hadir sebagai amicus curiae di Mahkamah Tinggi. Perintah berikutnya, perayu dikehendaki membuat pindaan perlu kepada pihak-pihak dalam tindakan (lihat perenggan 23 & 27).]

Notes

For cases on application for intervention, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 4739–4755.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors [2007] 5 MLJ 441, HC (refd)

Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)

Jerry WA Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor [2015] 1 MLJ 675, CA (refd)

Levy v State of Victoria (1997) 189 CLR 579, HC (refd)

Magor and St Mellons Rural District Council v Newport Corporation [1952] AC 189, HL (refd)

Magor and St Mellons Rural District Council v Newport Corporation [1950] 2 All ER 1226, CA (refd)

Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307; [2009] 6 CLJ 409, FC (refd)

Malaysia Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145, FC (refd)

Mohd Hanif Quareshi & Others v The State Of Bihar 1958 AIR 731, SC (refd)

Nurasmira Maulat bt Abd Jaffar & Ors v Ketua Polis Negara & Ors [2015] 3 MLJ 105, CA (refd)

Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho and other appeals [2016] 4 MLJ 455; [2016] 1 CLJ 911, CA (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

A *Racha ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors* [2014] 3 MLJ 661, CA (refd)
Rookes v Barnard [1964] 1 All ER 367, HL (refd)
Seaford Court Estates Ld v Asher [1949] 2 KB 481, CA (refd)
Tajjul Ariffin bin Mustafa v Heng Cheng Hong [1993] 2 MLJ 143, CA (refd)
B *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 213; [2015] 3 AMR 35, CA (refd)

Legislation referred to

C Administration of Islamic Law (Federal Territories) Act 1993 ss 4, 31
Civil Law Act 1956 s 3(1)
Interpretation Acts 1948 and 1967 s 17A
Rules of Court 2012 O 53 , O 53 rr 2, 3, 8

D **Appeal from:** Judicial Review Application No R2–25–407 of 2007 (High Court, Kuala Lumpur)

Lim Heng Seng (Bobby Chew Chin Guan and Tan Hooi Ping with him) (Chris Koh & Chew) for the appellants.
E *Haniff Khatri (Haniff Khatri) for the first respondent.*
Irzan Iswatt (Mohamad Rizal bin Fadzil with him) (Senior Federal Counsel, Attorney General's Chambers) for the second and third respondents.

Hamid Sultan JCA (delivering judgment of the court):

F

[1] The appellants appeal against the decision of the learned trial judge who allowed the respondent Majlis Agama Islam Wilayah Persekutuan ('MAIWP') to intervene and made as one of the respondent to the judicial review application. The matter came up for hearing on 19 July 2016 and we reserved
G judgment. The judicial review application has not been finally disposed of in the High Court. My learned brother Zamani A Rahim JCA and sister Zaleha bt Yusof JCA have read the judgment and approved the same.

[2] We do not wish to set out the full facts and issues in this case as it has been
H set out by the learned trial judge and also by the Court of Appeal in the same matter where leave to pursue the declarations was allowed (see *Jerry WA Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor* [2015] 1 MLJ 675 (CA)).

I **[3]** The memorandum of appeal of the appellant reads as follows:

(1) The learned Judge erred in finding that MAIWP has a direct interest and is a proper person under Order 53 rule 8(1) of the Rules of Court 2012 ('RC 2012') to be heard in opposition to the Appellants' judicial review application.

(2) The learned Judge erred in failing to appreciate sufficiently or at all that the Appellants' judicial review application pertains to the 2nd Respondent's decision prohibiting the use of the word 'Allah' in all publications of the Appellants vide a letter dated 24.10.2007 made pursuant to the 2nd and 3rd Respondents' Government directive dated 5.12.1986 bearing the reference KDN:S.59/3/9/A Kit.2 which unlawfully interferes with the constitutional rights of the Appellants to manage their own religious affairs and the religious freedom of the Appellants' congregationists to profess and practise their religion and that these are matters in which MAIWP has no direct interest.

(3) The learned Judge erred in failing to appreciate sufficiently or at all and to duly apply the ratio decidendi in *Majlis Agama Islam Selangor v Bong Boon Chuen* [2009] 6 CLJ 405 ('Bong Boon Chuen') a decision of the Federal Court which held that the phrase 'proper person' in Order 53 rule 8(1) of RC 2012 must be read as referring to 'persons with direct interest' for the proposed intervener to be allowed to be joined as a party.

(4) The learned Judge erred in failing to appreciate sufficiently or at all that the test to be applied for the question whether a person has a direct interest as established in *Bong Boon Chuen* is whether the intended intervener's rights against or liabilities to any party to an action in respect of the subject matter of the action will be directly affected by any order which may be made in the action.

(5) The learned Judge erred in failing to appreciate sufficiently or at all the 'direct interest' test established in *Bong Boon Chuen* when in determining whether MAIWP has direct interest she considered the nature of the reliefs sought by the Appellants without relating it to how MAIWP's rights against or liabilities to the Appellants in their judicial review application are directly affected by any order which may be made in the said application.

(6) The learned Judge erred in failing to appreciate sufficiently or at all that MAIWP does not have any rights against or liabilities to the Appellants in their judicial review application and hence cannot conceivably or logically be directly affected by any order that may be made in the absence of any such rights or liabilities.

(7) The learned Judge erred in failing to appreciate sufficiently or at all and to reject MAIWP's purported direct interest in the Appellants' judicial review application premised on Administration Of Islamic Law (Federal Territories) Act 1993 ('Act 505') as matters of precepts of Christianity and constitutional rights of the Appellants who are non-Muslims do not fall within the statutory powers, duties or functions of MAIWP set out in Act 505.

(8) The learned Judge erred in failing to appreciate sufficiently or at all that MAIWP being a body corporate created by Parliament under Act 505 cannot exceed its powers, duties and functions under Act 505 and that the

same as set out in Act 505 do not constitute the requisite direct interest for MAIWP to intervene in the Appellants' judicial review application.

(9) The learned Judge erred in failing to appreciate sufficiently or at all that MAIWP's reliance on the rights and powers of the Yang di-Pertuan Agong ('YDPA') as the Head of the religion of Islam in the Federal Territories stipulated in Section 3 of Act 505 is irrelevant as the YDPA's rights and powers are not under challenge in the Appellants' judicial review application and in any event does not constitute the requisite direct interest to warrant MAIWP's intervention.

(10) The learned Judge erred in failing to appreciate sufficiently or at all that MAIWP's reliance on Sections 4(1) and 31 of Act 505 and/or on Article 3(5) of the Federal Constitution to advise the YDPA on matters of Islam does not constitute the requisite direct interest as there is nothing in the said provisions which provides any responsibility, authority or discretion to MAIWP with regard to the matter of the Appellants' constitutional rights or the administration of the laws and in particular the Printing Presses And Publications Act 1984 pertinent to the Appellants' judicial review application.

(11) The learned Judge erred in failing to appreciate sufficiently or at all that MAIWP's powers pursuant to Section 5(2) of Act 505 'to sue and be sued in its corporate name' must clearly be for the purpose of performing its statutory duty and not to incur funds for legal expenses in court litigation to oppose the rights of the Appellants.

(12) The learned Judge erred in failing to appreciate sufficiently or at all that MAIWP's interest purportedly found in its statutory duty in Section 7(1) of Act 505 'to promote, stimulate, facilitate and undertake the economic and social development and well-being of the Muslim community in the Federal Territories consistent with Islamic Law' does not constitute the requisite direct interest, inter alia in that such statutory duty does not extend to interfering with the freedom of non-Muslims such as the Appellants and their congregationists to profess and practise their religion under the Federal Constitution.

(13) The learned Judge erred in failing to appreciate sufficiently or at all that MAIWP's purported mandate under Section 31 of Act 505 to administer Islamic law and all matters concerning the religion of Islam in the Federal Territories, except matters of Islamic Law and those relating to the administration of justice does not constitute the requisite direct interest and does not in any event extend to taking steps to intervene with the freedom of non-Muslims such as the Appellants and their congregationists to profess and practise their religion under the Federal Constitution.

(14) The learned Judge erred in failing to appreciate sufficiently or at all that MAIWP's reliance on its statutory power pursuant to Section 58 of Act 505 to recommend the necessary officers to be appointed into the necessary institution and/or department carrying out matters related to Islamic law and/or administration of justice does not constitute the

requisite direct interest and in any event such statutory power is not under challenge in the Appellants' judicial review application and such power can be exercised without the necessity of intervening in and/or being a party to the Appellants' judicial review application.

(15) The learned Judge erred in failing to appreciate sufficiently or at all that MAIWP's purported duty pursuant to Sections 7 and 58 of Act 505 read with Section 298A(1) of the Penal Code and Section 9 of the Selangor's Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment, 1988 to control and/or restrict the expansion of other religion amongst Muslims in the Federal Territories is erroneous and an attempt to usurp the power of Parliament which is vested with the legislative power to control or restrict the propagation of non-Islamic religious doctrine in the Federal Territories and such power is not vested in MAIWP and does not therefore constitute the requisite direct interest.

(16) The learned Judge erred in failing to appreciate sufficiently or at all that MAIWP's purported and self-asserted responsibility to carry out and/or supervise investigations by the police and/or any enforcement officers pursuant to Section 298A(1) of the Penal Code is ultra vires Act 505 and would constitute an attempt to usurp or assert powers vested in the police and enforcement officers by the pertinent statutes and clearly cannot constitute the requisite direct interest.

(17) The learned Judge erred in failing to appreciate sufficiently or at all that MAIWP's claim that its legal interest will be affected by the decision made in the Appellants' judicial review application is unsubstantiated as there is nothing in Act 505, the Federal Constitution and/or the laws pertinent to the Appellants' judicial review application which vests any power, duty, function or responsibility upon MAIWP to control, restrict and/or to interfere with the rights of non-Muslim Malaysians and specifically the rights of the Appellants and their congregationists as Christians to profess and practise their freedom of religion which is guaranteed under the Federal Constitution.

(18) The learned Judge erred in all the facts and circumstances in allowing MAIWP's Intervener Application contrary to the decision of the Federal Court in *Bong Boon Chuen* and the established principles of law which are binding on the High Court.

PRELIMINARIES

[4] What is essential to note in this case is that: (i) the appellants prayer for certiorari and mandamus in respect of the Minister of Internal Security Affairs seizure of publication related to the word 'Allah' was withdrawn in consequence of the return of the same to the appellants; (ii) what was left in the prayer has nothing to do with judicial review of the Minister's decision but an academic prayer couched as declaration purportedly said to be permissible under O 53 r 2 of the Rules of Court 2012, which reads as follows:

A Applications (O 53, r 2)

(2) An application for judicial review may seek any of the reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application *if it relates to or is connected with the same subject matter*. (Emphasis added.)

B

[5] The several declarations that the appellant seeks relates to the applicants constitutional right to use the word 'Allah' in the Bahasa Malaysia and/or Bahasa Indonesia translations of the Bible as well as in all religious publications and material (all other publications) in this country. The declaration sought reads as follows:

C

(c) a declaration that in the exercise of freedom of religion guaranteed under Article 11 of the Federal Constitution it is the constitutional right of the Applicants and their Bahasa Malaysia speaking congregationists to use the term 'Allah' in the Bahasa Malaysia and/or Bahasa Indonesia translations of the Holy Bible as well as in all religious publications and materials;

D

(d) a declaration that pursuant to Article 11 of the Federal Constitution it is the constitutional right of the Applicants to import the Publications in the exercise of the Applicants' and/or their congregationists right to practise their religion;

E

(e) a declaration that pursuant to Article 11 and Article 12 of the Federal Constitution it is the constitutional right of the applicants to use the term 'Allah' in the Bahasa Malaysia and/or Bahasa Indonesia translations of the Holy Bible as well as in all religious publications and materials in the exercise of the Applicants' and/or their congregationists' right to instruct their children in their religion;

F

(f) a declaration that pursuant to Article 11 and Article 12 of the Federal Constitution it is the constitutional right of the Applicants to import the Publications in the exercise of the Applicants' and/or their congregation's right to instruct their children in their religion;

G

(g) a declaration that pursuant to Article 8 of the Federal Constitution the Applicants and their congregationists are guaranteed equality of all persons before the law and are protected from discrimination against citizens, inter alia on the grounds of religion on account of their Christian faith in the administration of the law, in particular of the Printing Presses And Publications Act 1984 and of the Internal Security Act 1960;

H

(h) a declaration that pursuant to Article 8 read with Article 11 of the Federal Constitution the Applicants and their congregationists are entitled to use the word 'Allah' and to have access including the right to own, to possess, to use and to import published materials notwithstanding the use of the word 'Allah' in the said publications including the Publications in the exercise of their freedom to practice their religion;

I

(i) a declaration that Article 3(1) of the Federal Constitution stating that Islam is the official religion of the Federation does not authorise the 1st Defendant to prohibit the Applicants and their congregationists from using the term 'Allah' and or to prohibit possession of the Alkitab in Bahasa Malaysia and Bahasa Indonesia and all published materials, including the Publications, notwithstanding the use of the word 'Allah' in the said publications;

(j) a declaration that the applicants and their congregationists have the right to use the term Allah and to have access to the Alkitab in Bahasa Malaysia and Bahasa Indonesia and all published materials, including the Publications, not only in churches but in any place, dwelling or building in the practice of their religion notwithstanding the use of the word 'Allah' in the said publications pursuant to Article 3(1) and Article 11 of the Federal Constitution which guarantees the freedom of religion and the right of all religions to be practised in peace and harmony in any part of the Federation;

(k) a declaration that it is the legitimate expectation of the Applicants and their congreagationists to use the term 'Allah' and to have access to the Alkitab in Bahasa Malaysia and Bahasa Indonesia and all published materials including the right to import the Publications notwithstanding the use of the word"Allah' in the said publications;

(l) a declaration that the order published in the Gazette vide PU (A)15/82 prohibiting absolutely the printing publication sale issue circulations or possession of the Alkitab purportedly under Section 22 of the Internal Security Act I960 on the grounds that the said document is prejudicial to the national interest and security of the Federation is in excess and ultra vires of the said Act and or unconstitutional and therefore null and void and of no effect;

(m) a declaration that that subsidiary legislation made by order published in the Gazette vide PU (A)15/82 purportedly under Section 22 of the Internal Security Act 1960 pertaining to the prohibition of the Alkitab be declared unconstitutional, null and void and of no effect being contrary to Article 3, 8, 11, 12 and 149 of the Federal Constitution;

(n) a declaration that the decision to permit the use of the Alkitab by Christians in churches only and not in any other places is unconstitutional and null and void being contrary to Articles 3, 8, 11 and 12 of the Federal Constitution;

(o) a declaration that Islam and the propagation of any religious doctrine or belief among persons professing the religion of Islam under Article 11(4) of the Federal Constitution is a state matter within the competency of the constituent states of the Federation and not a federal matter save for the Federal Territories of Labuan, Kuala Lumpur and Putrajaya:

(p) a declaration that the action of the Defendants in categorising the use of the words 'Allah'. 'Baitullah', 'Solat' and 'Kaabah' as 'sensitive' and as a 'security issue' followed by making the order published in the Gazette vide PU (A)15/82 prohibiting absolutely the printing, publication, sale, issue, circulations or possession of the Alkitab and the issuance of the circular KKDN. S.59/3/6/A dated 5th Dec 1986 is an unconstitutional exercise of executive and/or legislative power being in pith and substance a matter within the competence of the constituent states of the federation;

(q) a declaration that the administrative decision, of the 2nd Respondent stated to have been made on 19.5.1986 that the words 'Allah', 'Kaabah', 'Baitullah' and 'Solat' are words and phrases exclusive to the religion of Islam and cannot be used in published materials of other religions save to explain concepts pertaining to the religion of Islam and the circular KKDN S.59/3/6/A dated 5th Dec 1986 issued thereafter is unconstitutional and null and void being contrary to Article 3, 8, 11, 12, 74, 76 and 80 of the Federal Constitution;

(r) a declaration that the 1st Defendant had unlawfully detained the Publications which had been seized under the Customs Act 1967 and that the same shall be returned to the Applicants forthwith.

[6] Declaration whether in civil or constitutional matter is a discretionary relief. Being discretionary relief, the courts generally will not entertain academic prayers. Where the Constitution is involved, courts generally will not indulge in prayers in the nature of 'quia timet' or prayers to stop a possible breach of constitutional right of the public or a group or a person in the future. For example, you cannot get a declaration to say all children born in Malaysia for Malaysian citizens must be given identity card as of right. You can only seek a declaration based on the Constitution to issue the identity card if the relevant authority had refused to issue the identity card. Even in jurisdiction like India, the Indian Courts does not even in public interest litigation entertain a future possible breach of the Constitution save in a limited sense gives appropriate direction for rule of law to be maintained. The breach must take place for the courts to provide the relief. In our view, the parties here must strictly look at the prayers and ventilate before the High Court whether such declaration in the first instant is permissible. If not for the said academic declarations, etc MAIWP would not have ordinarily made an application to intervene.

[7] It must also be noted that once the prayer for certiorari and mandamus is withdrawn, then the character of suit will not be judicial review per se. What judicial review means in England is that (a) the review of the decision of executive and/or inferior tribunal, etc; (b) review of subsidiary legislation; and (c) to a limited extent review of policy decision. What is meant by judicial review in Malaysia is (a) review of the decision of executive and/or inferior tribunal, etc; (b) review of legislation; (c) review of constitutional amendment;

and (d) review of policy decision (see *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 213; [2015] 3 AMR 35 and *Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho and other appeals* [2016] 4 MLJ 455; [2016] 1 CLJ 911). For judicial review under O 53, there must be a decision and the time period is important. For judicial review of legislation and/or Constitutional Amendment, the time period is not relevant neither is the locus standi issue. Normally such challenges are taken by writ or originating summons (see *Racha ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors* [2014] 3 MLJ 661). For bare declarations as the instant case in the nature of public interest litigation, the issue of locus standi need to be satisfied, unless the applicant can show that his rights has been affected.

[8] Notwithstanding the above to a limited extent, public interest litigation in Malaysia is permissible provided the strict requirement of locus standi requirement is satisfied (see *Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12; *Malaysia Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145; *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; and *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors* [2007] 5 MLJ 441). In India, public interest litigation is permissible without much emphasis to the issue of locus standi. In the *Malaysia Trade Union Congress* case, where CJ Tun Arifin Zakaria was a member of the coram, the Federal Court through Hasan Lah FCJ had this to say:

> 56. In India, the Indian judicial approach on standing has 'veered towards liberalisation of the locus standi as the courts realise that taking a restrictive view on this question will have many grievances unremedied' (see *Principles of Administrative Law*, MP Jain & S N Jain (6th Ed) at p 1994.

[9] Looking at the prayers of the appellant, it will appear that none of them after the withdrawal of certiorari and/or mandamus will relate to judicial review but will only stand as public interest litigation. Once, the suit changes into the character of public interest litigation then the locus standi issue will become very relevant. Further, public interest litigation is not meant to stop a future breach of a constitutional provision by the authorities. Courts can only provide relief when the applicant shows that his constitutional right at a particular instant has been breached. If the litigant can establish his right has been breached, the court may even grant damages against the authorities for breach of constitutional right (see *Rookes v Barnard* [1964] 1 All ER 367; *Nurasmira Maulat bt Abd Jaffar & Ors v Ketua Polis Negara & Ors* [2015] 3 MLJ 105). We are aware that there are number of decision on 'Allah' issue and many more issues related to the Federal Constitution where the issue of locus standi as well as academic relief of this nature was not discussed and/or parties have failed to raise the issue. In our view, once the character of the suit is

changed to the nature of public interest litigation, then the locus standi issue need to be ventilated before the trial court. Further, the court must also decide whether such prayers are academic, pre-mature, etc.

[10] The real issue before the trial court in the instant case was that whether MAIWP which is a body corporate has a right to intervene. The learned trial judge having looked at the provisions of MAIWP Act 1993 ('Act 505'), in our view rightly ruled that there is no express power for MAIWP to intervene. However, having said there was no express power to intervene, the learned trial judge went on to rule that MAIWP has implied power without citing any authority for such a proposition here or in the Commonwealth. That part of the learned trial judge grounds in the judgment reads as follows:

> 31. It is trite that the powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporations, or may be fairly required as incidental to, or consequential upon, those things which the Legislature has authorized. What the statute does not expressly or impliedly authorize is to be taken to be prohibited (see *Bank Pertanian Malaysia Bhd v Koperasi Permodalan Melayu Negeri Johor* and *Malaysia Shipyard and Engineering Sdn Bhd v Bank Kerjasama Rakyat Malaysia Bhd*).
>
> 32. I have carefully perused Act 505 to determine whether MAIWP has the power to intervene in this judicial review proceeding. I agreed that Act 505 do not give such express power to MAIWP.
>
> 33. However, the issue to be considered is whether MAIWP has an implied power to intervene in proceedings involving question of the use of the word Allah by non-Muslims in its religious publications in this country (including the Federal Territories). I am of the opinion that the power is fairly implied to the express powers given by Section 4 and Section 31 of the Act. Hence in my view, MAIWP has an implicit power to intervene in this judicial review proceeding.
>
> 34. In my opinion, by providing general powers to MAIWP under Section 4 and section 31, Parliament must be taken to have intended that MAIWP should perform an overall role in respect of all matters relating to religion of Islam in the Federal Territories (except matters of Islamic Law and those relating to the administration of justice).

[11] Sections 4 and 31 of Act 505 read as follows:

> Section 4 Establishment of the Majlis
>
> (1) There shall be a body to be known as the 'Majlis Agama Islam Wilayah Persekutuan' to advise the Yang di-Pertuan Agong in matters relating to the religion of Islam.

(2) Upon the coming into force of this section, the 'Majlis Agama Islam Wilayah Persekutuan' existing by virtue of section 5 of the Enactment shall be deemed to be the Majlis referred to in subsection (1).

Section 31 Authority of Majlis

The Majlis shall aid and advise the Yang di-Pertuan Agong in respect of all matters relating to the religion of Islam within the Federal Territories, except matters of Islamic Law and those relating to the administration of justice, and in all such matters shall be the chief authority in the Federal Territories after the Yang di-Pertuan Agong, except where otherwise provided in this Act.

It is thus clear from reading of the sections, the provisions merely provide for the establishment of MAIWP which is tasked to advise the Yang Di Pertuan Agong on matters relating to Islam within the Federal Territories. Section 31 also provides that MAIWP shall be the chief authority in the Federal Territories after the Yang Di Pertuan Agong in matters relating to Islam. To say these provisions impliedly empower MAIWP to intervene in this proceeding in our view does not subscribe to any jurisprudential principle relating to construction of statute.

[12] In our view, it is an elementary principle of common law rules of construction of the statute that court should not import views which are not expressly provided by the statute. To say it crudely, it is not for the courts to fill in the gaps on matters which the Legislature has not written. In *Magor and St Mellons Rural District Council v Newport Corporation* [1950] 2 All ER 1226 at p 1236, one of the Lords Justices in the Court of Appeal had in effect, said that the court having discovered the supposed intention of Parliament *must proceed to fill in the gaps,* that is to say what the Legislature has not written the court must write. But on appeal to the House of Lords [1952] AC 189, Lord Simonds at p 191, disapproved of the approach that was taken by the Court of Appeal and said:

It appears to me to be a *naked usurpation of the legislative function under the thin disguise of interpretation*.

[13] We are also mindful of the decision of Lord Denning before the above House of Lords decision in *Seaford Court Estates Ld v Asher* [1949] 2 KB 481, where His Lordship had held that the Act should be interpreted according to the mischief that Parliament attempted to remedy, with consideration of the social conditions that prevailed at the time. His Lordship had this to say:

The question for decision in this case is whether we are at liberty to extend the ordinary meaning of 'burden' so as to include a contingent burden of the kind I have described. Now this court has already held that this sub-section is to be liberally construed so as to give effect to the governing principles embodied in the legislation (*Winchester Court Ltd v Miller*); and I think we should do the same. Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it

A were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. *In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature*. That was clearly laid down by the resolution of the judges in *Heydon's case*, and it is the safest guide to-day. Good practical advice on the subject was given about the same time by Plowden in his second volume *Eyston v Studd.* Put into homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. *A judge must not alter the material of which it is woven, but he can and should iron out the creases*. (Emphasis added.)

[14] Even then Lord Denning was not suggesting the gap should be filled.

[15] We are also mindful of the purposive rule under s 17A of the Interpretation Acts 1948 and 1967 which reads as follows:

> 17A In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

Even s 17A is not meant to fill the gap in the legislation.

[16] Leaving aside whether there is an implied power under the MAIWP Act to intervene, it must be made clear here that the jurisprudence of intervention is not related to implied power but one directed to the nature of the interest. The Federal Court in *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307; [2009] 6 CLJ 409 had ruled that there must be direct interest. Notwithstanding the 'direct interest' rule, there is an overriding discretion given to the court, in the absence of intervener application for the court by its own motion to hear persons who desire to be heard. That does not mean all interested parties. That is to say, unlike civil suits where the court can hear or invite all interested parties that will not be the case under O 53 r 8 (see *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 (CA); *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143). The scope for intervention in judicial review is

limited. This is set out in O 53 r 8 which reads as follows:

> 8(1) Upon the hearing of an application for judicial review, any person who desires to be heard in opposition to the application and appears to the Judge to be a proper person to be heard may be heard notwithstanding that he has not been served with the cause papers in the matter.

[17] This overriding discretion given to the courts has been curtailed by judicial decisions to say that the party who wants to intervene must show direct interest in the matter. In practice, the only exception to the 'direct interest' rule is the participation of the attorney general or Attorney General's Chambers per se. However, the courts discretion to hear a party who wants to be heard has not been curtailed. In appropriate case the court may even invite any party who wants to be heard to be 'amicus curiae'.

[18] Thus, to determine the question whether MAIWP has the right to intervene, the only issue as we see in this case is that whether the first respondent, MAIWP has demonstrated a direct interest in the instant case as well as whether the attorney general will be the most appropriate person to speak on behalf of public interest issues as guardian of public interest. In the instant case, the senior federal counsel is acting for the second and third respondents. That is to say, the attorney general is already indirectly participating in the said action. We had also, during the course of the hearing, post two questions to the parties. They are as follows:

(a) What is the implication of MAIWP's intervention in this judicial review application on the role of the Attorney-General ('AG') as a guardian or custodian of public interest in judicial review cases involving public interest?

(b) Whether this role of the AG can be taken away or duplicated by other departments or other bodies and associations who claim to have an interest to intervene in the judicial review?

[19] It must also be pointed out that the appellant has no objection for the first respondent to appear as amicus curiae.

[20] As we have mentioned earlier, what is also essential to note in this case is that, the moment that the appellants had withdrawn their prayers for certiorari and/or mandamus and is only seeking declaratory prayers, the character of judicial review proceedings changes into public interest litigation. Whether public interest litigation is permissible under O 53 or should proceed by way of writ or originating summons, etc is another matter which the Attorney General's Office ought to ventilate before the High Court (see *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865; *Teh Guat Hong v Perbadanan*

Tabung Pendidikan Tinggi Nasional [2015] MLJU 213; [2015] 3 AMR 35). In India, it will appear that intervention in public interest litigation is only permitted to the Attorney General of India or the Advocate General of the States (see *Mohd Hanif Quareshi & Others v The State Of Bihar* 1958 AIR 731). The sine qua non for O 53 to apply necessarily must relate to a decision. The declaratory prayers stated here are not related to any decision as the complaint related to the decision has been withdrawn. Order 53 r 2 reads as follows:

> 2(1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of habeas corpus) shall be in Form 109.
>
> (2) An application for judicial review may seek any of the reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.
>
> (3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation:
>
> Provided that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1956 [Act 359] and section 54 of the Specific Relief Act 1950.
>
> (4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

Under O 53 r 2, only a person who is adversely affected by the decision, etc can make the application. This is a strict requirement.

JURISPRUDENCE RELATING TO INTERVENERS AND THE THRESHOLD REQUIREMENT TO BE SATISFIED

[21] The test for intervention is not one and the same in all jurisdictions. The Australian position appears to be one that the individual or organisation must have direct or indirect interests in the proceedings. The courts there have gone to say that a direct interest is established where a non-party will be bound by the court's decision and accordingly, intervention to protect their interest must be permitted (see *Levy v State of Victoria* (1997) 189 CLR 579; article — *Interveners or Interferers: Intervention in Decision to Withhold and Withdraw Life-Sustaining Medical Treatment* by Lindy Willmot, 'Ben White' and Donna Cooper).

[22] As we have stated earlier that the consequence of the withdrawal of the judicial review orders of certiorari and mandamus; the character of the suit from judicial review had been changed to public interest litigation and the most appropriate person to be heard on public interest litigation will be the attorney general. As early as 1958, the Indian Supreme Court in the case of *Mohd Hanif Quareshi & Others v The State Of Bihar* 1958 AIR 731 was asked

to decide the constitutional validity of three several legislative enactments banning the slaughter of certain animals passed by the States of Bihar, Uttar Pradesh and Madhya Pradesh, in which few organisations sought leave to intervene in those proceedings. While deciding the writ petitions, the Indian Supreme Court had this to say:

> Bharat Go-Sevak Samaj, All India AntiCow-Slaughter Movement Committee, Sarvadeshik Arya Pratinidhi Sabha and M. P. Gorakshan Singh put in petitions for leave to intervene in these proceedings. Under Order XLI, rule 2, of' the Supreme Court Rules intervention is permitted only to the Attorney- General of India or the Advocates General for the States. There is no other express provision for permitting a third party to intervene in the proceedings before this Court. In practice, however, this Court, in exercise of its inherent powers, allows a third party to intervene when such third party is a party to some proceedings in this Court or in the High Courts where the same, or similar questions are in issue, for the decision of this Court will conclude the case of that party. In the present case, however, the petitioners for intervention are not parties to any proceedings and we did not think it right to permit them formally to intervene in these proceedings; but in view of the importance of the questions involved in these proceedings we have heard Pandit Thakurdas Bhargava, who was instructed by one of these petitioners for intervention, as amicus curiae.

[23] From the above case, it is quite clear where a party does not have a right to intervene but the court takes the view that the importance of the questions involved in the proceedings; the intervention as amicus curiae is permissible. Brennan CJ in the Australian case of *Levy* has set out some guidelines for consideration to allow an applicant to intervene as amicus curiae and in the article cited above, it has been summarised as follows:

(a) the court must be cautious in considering applications for leave to appear as amicus as the efficient operation of the court could be prejudiced;

(b) the court must be of the opinion that the amicus will significantly assist the court and that any resultant cost to the parties or any subsequent delay will not be disproportionate to the anticipated assistance; and

(c) the current parties to the matter must be unable or unwilling to provide the assistance to the court proposed by the amicus that is needed to arrive at the correct decision in the case.

[24] The Federal Court as we have said earlier had ruled out the 'indirect interest' concept and had asserted the 'direct interest' rule for intervention. In *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors*, Zulkefli Makinudin FCJ had held:

> (1) Order 53 r 8(1) of the RHC specifically caters to persons claiming an interest in the proceedings and who wish to be heard in opposition. This

A is discernible from the language of the rule, in particular the phrase '... appears to the judge to be a proper person ...'. As a specific rule was put in place for judicial review proceedings, the more general basis for intervention under O 15 r 6(2)(b) of the RHC cannot be invoked. Therefore, the decision of the majority of the Court of Appeal in the B present case that the appellant's application must be brought under O 53 r 8(1) of the RHC was correct. Question (i) was thus answered in the negative. (para 16)

(2) Since the appellant, on the facts, did not have an interest, either to satisfy O 15 r 6(2)(b), both limbs (i) and (ii), of the RHC or even O 53 r 8(1) of C the RHC, Question (ii) must be answered in the negative as well. The appellant at best had an indirect interest, which was insufficient to justify intervention under either provision. *Pegang Mining Co Ltd v Choong Sam & Ors (refd); R v Rent Officer Service, ex parte Muldoon; R v Rent Officer Service, ex parte Kelly (foll).* (paras 17, 18, 19, 20, 21, 22, 23 & 24)

D

(3) The appellant's contention that this court could invoke its inherent jurisdiction to allow the applicant to come in as a party to the judicial proceedings in the event O 15 r 6(2)(b) of the RCH was found to be inapplicable was, in the circumstances of this case, untenable. There is a specific provision in O 53 r 8(1) of the RHC, and this court's inherent E jurisdiction cannot be invoked to override the application of a specific rule. *Permodalan MBf Sdn Bhd v. Tan Sri Dato' Seri Hamzah Abu Samah & Ors (foll).* (para 26).

F **[25]** In Malaysia, as well as many jurisdictions in the commonwealth, the attorney general is also the guardian of the public right/interest in accordance with the rights of the attorney general under English common law pursuant to s 3(1) of the Civil Law Act 1956. Consistent with this jurisprudence, O 53 makes it compulsory to give notice of any proceedings related to judicial review to alert the attorney general to take appropriate action as deemed necessary. G The said O 53 r 3 reads as follows:

> 3(3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

H

[26] As said earlier, in this matter the attorney general is duly represented and vigilant, sufficient in our view to protect the public right and/or interest within the watchful eyes of the courts with judges who have taken a constitutional oath to preserve, protect and defend the Constitution.

I

[27] We have read the able submissions of the learned counsel. After giving much consideration to the submission of the learned counsel for the first respondent, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(a) as the law stands, the threshold test for intervener is for the applicant to demonstrate direct interest. In the instant case, we do not see how the first respondent will be affected by any order of the court other than a circuitous reasoning which will not satisfy the direct interest test. MAIWP has no rights over and owes no liabilities to the appellant or non-Muslims; and

(b) however, we recognise that the first respondent has a positive role to play within the mandate of MAIWP Act 1993 to assist the court as amicus curiae. In consequence, the order for intervention is set aside with liberty for the first respondent to appear as amicus curiae in the High Court. As a consequential order, the appellant is to make the necessary amendments to the parties to the suit.

[28] For reasons stated above, we hereby allow the appeal with no order as to costs. The order of the High Court is set aside. The first respondent is at liberty to appear as amicus curiae in the High Court. Deposit is to be refunded.

We hereby order so.

Appeal allowed with no order as to costs; order of the High Court set aside.

Reported by Afiq Mohamad